

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

**CARL STEWART,**

**Plaintiff**

**v.**

**DAVID VARANO, *et al.*,**

**Defendants**

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**CIVIL NO. 1:10-CV-1701**

**(Judge Rambo)**

**(Magistrate Judge Mannion)**

**MEMORANDUM**

Before the court is a remand order issued on August 16, 2013 by the United States Court of Appeals for the Third Circuit. The order stated, in part:

We retain jurisdiction but remand this matter to the District Court to consider Appellant's notice of appeal, which sets forth the reasons for his belated filing as including a motion to extend the time to file an appeal under Federal Rule of Civil Procedure 4(a)(5)<sup>1</sup> and motion to reopen the time to file an appeal under Federal Rule of Civil Procedure 4(a)(6).<sup>2</sup>

On November 9, 2012, this court entered an order adopting the report and recommendation of a magistrate judge and granted Defendants' motion to dismiss the captioned action (Doc. 113). On November 26, 2012, the memorandum and order sent to Plaintiff Stewart's last known mailing address was returned to the clerk of court as "undeliverable" and marked "RTS-Released" (Doc. 114). On December 5, 2012, Stewart filed a request for stay of proceedings and for enlargement of time to file objections to the report and recommendation (Doc. 115). That motion was denied as moot by order dated December 6, 2012 (Doc. 116).<sup>3</sup>

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<sup>1</sup>The cite should be Federal Rule of Appellate Procedure 4(a)(5).

<sup>2</sup>*Ibid.* Federal Rule of Appellate Procedure 4(a)(6).

<sup>3</sup>The order of this court dated November 9, 2012 (Doc. 112) describes all of the  
(continued...)

On December 11, 2012, Stewart filed a notice of appeal (Doc. 117).<sup>4</sup> The notice of appeal is signed December 11, 2012 and recites that he received the court's order dated November 9, 2012 on December 11, 2012. He immediately filed a notice of appeal on that date.

Federal Rule of Appellate Procedure 4(a)(1)(A) requires that a notice of appeal in a civil case must be filed with the district clerk within thirty days after the entry of judgment or order appealed from. The order of this court (Doc. 113) was entered on November 9, 2012. The notice of appeal was filed on December 11, 2012, one day beyond the 30-day required filing time.

Federal Rule of Appellate Procedure 4(a)(5) provides:

**(5) Motion for Extension of Time.**

(A) The district court may extend the time to file a notice of appeal if:

- (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and
- (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

When this court applies the rule above to Stewart's case, we find that even though the thirty day period expired one day prior to Stewart's filing of the notice of appeal, if the notice of appeal is viewed as a motion for an extension of time to file a notice of appeal, that motion is timely. Thus, Stewart's notice of appeal is timely filed.

This court is reluctant to treat the notice of appeal as a motion to reopen the time to file an appeal under Federal Rule of Appellate Procedure 4(a)(6) based on

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<sup>3</sup> (...continued)  
continuances granted to Stewart. Objections to the report and recommendation were originally due by June 29, 2012. All total, the continuances granted to Stewart gave him until November 5, 2012 to file objections to the supplemental report and recommendation – a total of over four months of continuances.

<sup>4</sup>Since Stewart was a prisoner, the date of filing is determined to be the date the document is placed in the institutional mailing system. Fed. R. App. P. 4(c).

the holding in *United States v. Paulk*, 453 Fed. Appx. 236 (2011) (citing *Poole v. Family Court of new Castle City*, 368 F.3d 263, 264 (3d Cir. 2004)), which held that a notice of appeal may not be treated as a motion to reopen under Federal Rule of Appellate Procedure 4(a)(6).

An appropriate order will be issued.

s/Sylvia H. Rambo  
SYLVIA H. RAMBO  
United States District Judge

Dated: August 23, 2013.

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**CIVIL NO. 1:10-CV-1701**

**(Judge Rambo)**

**(Magistrate Judge Mannion)**

**ORDER**

In accordance with the accompanying memorandum, **IT IS HEREBY ORDERED THAT**, upon remand, this court finds Stewart's notice of appeal filed on December 11, 2012, is also deemed to be a motion to extend the time to file an appeal under Fed. R. App. P. 4(a)(5). The motion is deemed timely filed and is granted.

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s/Sylvia H. Rambo  
SYLVIA H. RAMBO  
United States District Judge

Dated: August 23, 2013.